

DRAFT/11/30/11

SUBJECT: NEPA's "Purpose and Need" and CWA's "Basic and Overall Project Purpose" in the BDCP Context

TO: Karen Schwinn

FROM: Tom Hagler

I. The NEPA P+N

A. The NEPA Rules

"The [EIS] shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 CFR Section 1502.13.

B. The Status of the BDCP NEPA P+N statement

The Corps needs to do NEPA for its 404 permit for the conveyance facilities. The Corps would like to use the BDCP EIS as NEPA coverage for the Corps 404 permit. Therefore, the Corps should have some say in the BDCP EIS NEPA P+N statement. Here is what was tentatively agreed to in July 2011 as the NEPA Purpose and Need statement:

[Get from Nepstad email.]

The Corps agreed to this as the NEPA P+N via email on July 15th. EPA apparently gave a telephone "red-flag" review agreement on or about July 14th. Note that the Corps sign off under the MOU was premature, given that we did not have an MOU (and still do not) and that the statement was not given to us by the applicant (DWR) as stated under the MOU (if it gets signed).

It is not entirely clear whether these agreements apply to the lengthier language now given to us by DWR in various meetings, or whether DWR and the federal action agencies all agree on the language being submitted by DWR.

C. Programmatic v. Site-Specific P+N for NEPA

The Corps and EPA agree that the above NEPA P+N works for both the programmatic component and the site-specific component of the EIS.

II. The CWA 404 Basic and Overall Project Purpose Statement

A. Basic Project Purpose and Overall Project Purpose Under Section 404

From the Corps Standard Operating Procedures 2009 (attached below):

“12. Project Purpose

Defining the project purpose is critical to the evaluation of any project and in evaluating project compliance with the Section 404(b)(1) Guidelines. Defining the basic project purpose enables the Corps to determine if the activity is water dependent (see 40 CFR 230.10(a)(3))[that is, it requires access or proximity to, or siting within, a *special aquatic site*]. The overall project purpose is used to identify and evaluate practicable alternatives (see 40 CFR 230.10(a)(2))[for purposes of determining the LEDPA]. Decision documents should clearly define the basic and overall project purpose for each activity requiring a section 404 permit.”

B. Status of BDCP 404 Basic and Overall Project Purpose

1. For a site specific conveyance project permit

DWR staff has suggested some language. [See Erin’s markup, which has both the site specific and programmatic suggested language from DWR]. It is being reviewed by EPA and Corps staff.

2. For a “programmatic” or “Regional LEDPA” process. DWR outside counsel proposed a “Regional LEDPA” approach, perhaps along the lines of the PCCP. EPA and Corps staff think there are serious conceptual and pragmatic issues associated with this approach. This issue needs to be resolved before we can constructively re-engage on number one.

ATTACHMENT A

2009 Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program

12. Project Purpose

Defining the project purpose is critical to the evaluation of any project and in evaluating project compliance with the Section 404(b)(1) Guidelines. Defining the basic project purpose enables the Corps to determine if the activity is water dependent (see 40 CFR 230.10(a)(3)). The overall project purpose is used to identify and evaluate practicable alternatives (see 40 CFR 230.10(a)(2)). Decision documents should clearly define the basic and overall project purpose for each activity requiring a section 404 permit.

Basic Project Purpose and Water Dependency

The district is responsible for defining the basic project purpose. The basic purpose of the project must be known to determine if a given project is “water dependent” and requires access or proximity to, or siting within, a *special aquatic site* [emphasis added] in order to fulfill its basic purpose. For example, the basic project purpose of any residential development is to provide housing for people. Houses do not require access or proximity to a special aquatic site and they do not have to be located in a special aquatic site to fulfill their basic purpose of housing people. Therefore, a residential development is not water dependent.

If a project is not water dependent, alternatives that do not involve impacts to special aquatic sites are presumed to be available to the applicant, unless it is clearly demonstrated that such alternatives are not available (see 40 CFR 230.10(a)(3)). An activity that is not water dependent may still be authorized, as long as the 404(b)(1) Guidelines presumption against such discharges is successfully rebutted, the discharge meets the other criteria of the 404(b)(1) Guidelines, the activity is not contrary to the public interest, and it satisfies all other statutory and regulatory requirements.

Overall Project Purpose and Alternatives Analysis

The overall project purpose is used to evaluate less environmentally damaging practicable alternatives. The 404(b)(1) Guidelines state that an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes (40 CFR 230.10(a)(2)). This evaluation applies to all waters of the United States, not just special aquatic sites. Defining the overall project purpose is the district’s responsibility. However, the applicant’s needs and the type of project being proposed should be considered. The overall project purpose should be specific enough to define the applicant’s needs, but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines. [emphasis added]

on the table for the conveyance-specific